Supreme Court, U.S.
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No. 87-799

In The
Supreme Court of the United States
October Term, 1987

JAY LINDSAY, d/b/a MAC ADVERTISING, *et al.*,
Petitioners,

v.

CITY OF SAN ANTONIO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth U.S. Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals' opinion creates a presumption that any content-neutral governmental restriction on outdoor signs based on aesthetic interests is valid as against a challenge based on the First Amendment to the United States Constitution.

2. Whether the court of appeals' opinion conflicts with this Court's opinion in *Central Hudson Gas v. Public Service Com'n of New York,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980), in shifting the burden of proof in First Amendment cases involving outdoor signs, from the governmental unit in question to show that the restriction on speech directly advances permissible governmental goals and goes no further than necessary to achieve those goals to the party asserting its First Amendment rights.

3. Whether the court of appeals' decision conflicts with previous court of appeals' decisions of the Eleventh Circuit in *Dills v. Cobb County, Ga.,* 755 F.2d 1473 (11th Cir. 1985) and *Dills v. City of Marietta, Ga.,* 674 F.2d 1377 (1982), *cert denied* 461 U.S. 905, 103 S.Ct. 1873, 76 L.Ed. 2d 806 (1983).

4. Whether the rule announced in *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed. 2d 502 (1984) requiring that courts of appeal examine the whole record of a proceeding to assure that First Amendment rights are not intruded upon was properly applied to overturn a district court's preliminary injunction protecting Petitioner's rights to free expression.

LIST OF PARTIES

1. Jay Lindsay d/b/a MAC Advertisinig Company, Petitioner

2. Mike Swiercinsky, d/b/a Trail-A-Way Signs, Petitioner

3. Tom Lockridge, d/b/a Better Sign Rentals, Petitioner

4. City of San Antonio, Texas, Respondent

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

The Respondent respectfully submits its Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth U.S. Circuit.

CITATION TO OPINIONS BELOW

Petitioners accurately state the status of the opinions below in their Petition for Writ of Certiorari.

———o———

JURISDICTION

Petitioners accurately state their allegations of jurisdiction in their Petition for Writ of Certiorari.

———o———

STATEMENT OF THE CASE

1. Petitioners are substantially accurate in their recitation of the Course of Proceedings in the Petition for Writ of Certiorari.

2. Petitioners' recitation in the Review of Facts is too selective to present a fair condensed version of the testimony of the witnesses. Respondent will limit its response to some necessary additions and clarifications.

In regard to the ordinance at issue, there was testimony that content of signs was not a matter considered by the San Antonio City Council. There was testimony that the ordinance is content neutral. There was testimony that other styles of outdoor signs are available for both commercial and non-commercial speech.

In this regard Petitioner Lindsay testified that he built permanent as well as portable signs. Sharon Lee O'Bryan, the Petitioners' portable sign user witness, tes-

tified that Mr. Lindsay built a permanent sign for her use which was constructed to allow changeable copy so that the message conveyed could be easily changed (Tr p. 64). Petitioner Lockridge testified that his portable signs are primarily used for business, not non-commercial messages (Tr p. 71). Mr. Lockridge also testified that although he anchors his portable signs, the majority of portable signs in San Antonio are not so affixed (Tr p. 82).

Mr. Gene Camargo testified that other styles of signs were available to commercial and non-commercial users, and that the ordinance deals with only a type of structure (Tr p. 122). Mr. Camargo also testified that portable signs were less aesthetically pleasing than permanent signs (Tr pp. 114-115). The final decision regarding the method used to address aesthetic concerns of the city was made by its City Council (Tr. p. 131). Mr. Camargo also identified pictures of portable signs which were clustered in shopping strip centers, placed on street right-of-way, and by location obscuring the view of the motorist (Tr pp. 125-29).

Mr. David Fisch testified that he believed his traffic accident was in part caused by the placement of a portable sign. He called the City to ascertain the name of the sign owner, who he holds responsible for his collision (Tr p. 140).

Mr. John Mosty, Executive Director of the Respondent's Convention Visitors Bureau, testified that tourism was a 900 million dollar industry in San Antonio and thus the City's second leading money generator for the local economy (Tr p. 155). It is the natural beauty of the area that is important to tourists according to surveys taken

under his direction (Tr p. 156). Portable signs are aesthetically displeasing and thus harm an important industry (Tr p. 161).

Mr. Christopher Powers, a senior planner for the City, testified that because of the standard construction of portable signs, they never mesh with the area where displayed (Tr p. 169). He believed the ordinance was a proper way to deal with the aesthetic problems presented by the portable sign (Tr p. 168).

———o———

SUMMARY OF ARGUMENT

1. The Fifth Circuit properly applied the law as set forth in this Court's decisions on municipal sign regulation.
2. There is no conflict between the Fifth Circuit and the Eleventh Circuit regarding the regulation of signs for aesthetic purposes.
3. The Firth Circuit properly applied *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) to review the facts of a cause involving issues regarding the First Amendment to the United States Constitution.

———o———

ARGUMENT

Proper Application of Law

The City of San Antonio ordinance in question prohibits a type of sign. In this cause there is no question regarding any improper motivation on the part of the City

Council. The ordinance is content neutral in intent and form, and Petitioners have never claimed otherwise.

This Court has addressed the problems of government sign regulation in view of the limitations required by the First Amendment twice recently. In *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 69 L.Ed.2d 800, 101 S.Ct. 2882 (1981), the Court addressed a limitation placed upon both on- and off-premise signage by municipal ordinance. A majority of the Justices recognized the substantial government interest in both aesthetics and traffic safety. The plurality opinion of Justice White, however, found that the ordinance scheme did not pass constitutional muster because it limited core First Amendment expression more than commercial First Amendment freedoms. *Metromedia,* supra, 453 U.S. 490, 512-513. The plurality held that if a city were to tolerate billboards, it could not in making exceptions give preference to commercial expression. *Metromedia,* supra, 453 U.S. at 514-515, 521.

As the Petitioners herein candidly admit, the plurality opinion found that the San Diego ban MET the criteria of *Central Hudson Gas v. Public Service Commission of New York,* 447 U.S. 577, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), in its application to commercial speech. (Petitioner's Brief, p. 25). It was the preference given to commercial speech over "core" speech that caused a majority of this Court to find that the ordinance violated the First Amendment. *Metromedia, Inc. v. City of San Diego,* supra, 453 U.S. at 512-514.

In *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 80 L.Ed.

772, 104 S.Ct. 2118 (1984), this Court addressed an absolute ban on signs located on public property. The majority noted that seven justices "explicitly concluded" in *Metromedia,* supra, that a city's interest in aesthetics was significant enough to justify a total ban of billboards. *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789 at 806-807. If it is the medium utilized which causes the aesthetic concern, it is proper to address it by prohibition. *Vincent,* supra, 466 U.S. at 810-811.

The Appellate Court found that the City of San Antonio had shown in the preliminary injunction hearing the substantial interest of the city in bettering the environment:

> "Our review of the evidence would lead us to conclude, contrary to the result reached by the district court, that the record demonstrates that the ordinance does, in fact, further the city's aesthetic interest." *Lindsay v. City of San Antonio,* 821 F.2d 1103, 1110.

The City presented evidence that such portable signs are always out of harmony with the environment where placed because they are never designed to fit a structure or area. The City would stress that it does not limit pole signs to communicating commercial messages, regardless of location, and the Petitioners have never claimed otherwise. The City demonstrated the availability of alternate styles of sign in the trial and the Appellate Court affirmed that finding. *Lindsay v. City of San Antonio,* 821 F.2d 1103, 1111 (5th Cir. 1987). Here the City Council did no more than "eliminate the exact source of the evil it sought to remedy." *Vincent,* supra, 466 U.S. at 808.

Petitioners argue that the ban of portable signs is the ban of an entire medium of expression. (Petitioners' Brief, p. 24). Their Brief suggests that somehow the ordinance at bar is a ban of all outdoor advertising. (Petitioners' Brief, pp. 24-25). While the City does not hesitate to stipulate that it has many portable signs within its boundaries, it does not stipulate that all outdoor sign communication in the city is done by way of portable signs. The ordinance at issue is aimed at a style of outdoor sign, NOT the suppression of all signs. Indeed, the City of San Antonio provides special exemptions to address political and other non-commercial speech within its sign ordinances. Nor, as noted earlier, does the City restrict the message that may be put on a pole sign placed before a business or other structure.

The style of sign leased by Petitioners is approximately eight feet high, and the face of the sign begins about four feet from the ground (Tr p. 52). They are designed and built this way so that they may be seen by the public over the hood of a car in a parking area (Tr pp. 52-53). Petitioner Lockridge testified in part as follows:

"Q: (by Mr. Arronge) Is it advantageous to you to have your sign at the level, eye level, of the driver?

"A: It's advantageous to my customer.

"Q: And therefore you—

"A: I benefit from that because it's beneficial to my customer, yes.

"Q: And is that one of your selling points, where your sign is better than a permanent sign?

"A: I would say that is a very strong selling point, yes sir."

(Tr p. 81)

The testimony shows not only a problem with this style of sign vis-a-vis traffic and aesthetics, but also that the City's enforcement of its permanent sign standards has been more than "inconsequential." The appendix to this Brief shows some of the visual clutter and "creeping clutter" as portable signs, all of a standard height, creep ever closer to the roadway in an attempt to catch the eye of the passing motorist. Neither sidewalk nor drainage ditch can deter this steady creep. (Appendix, p. 3). These are but a sampling of the pictures entered by the City in the trial court.

Petitioners' argument that the Fifth Circuit has given municipalities carte blanche to end outdoor advertising is not borne out by an analysis of the opinion in light of what was at issue. That court ruled that the City had shown why a particular type of sign presented an aesthetic problem which was properly addressed by a ban on future placement of that type of sign. *Lindsay,* supra, at 1111. It was not error for the Court to give some weight to the judgment made by the body charged with the responsibility for making determinations about aesthetics, for this Court has held similar judgments to be worthy of judicial consideration in the context of a First Amendment challenge. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 299, 104 S.Ct. 3065, 82 L.Ed. 2d 221 (1984); *Metromedia,* supra, 453 U.S. at 509 (plurality).

No Conflict

The Petitioners states that there is a conflict of decisions between the Fifth and Eleventh Circuits and within the Eleventh Circuit itself. (Petitioner's Brief, pp. 27-28). Any such alleged conflict is more apparent than real if one notes that the city in *Dills v. City of Marietta,* 674 F.2d 1377 (11th Cir. 1982), *cert. denied* 461 U.S. 905, 103 S.Ct. 1873, 76 L.Ed. 2d 806 (1983) failed to present evidence regarding aesthetics. Recent decisions of that circuit show no conflict with the Fifth Circuit's decision challenged here. *Don's Porta Signs, Inc. v. City of Clearwater,* No. 86-3159 (11th Cir. 1987) (Petitioner's Brief, App. G); *Harnish v. Manatee County,* 783 F.2d 1535 (11th Cir. 1986).

Application of Bose

Petitioners argue that *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed. 2d 502 (1984) was improperly applied by the Court of Appeals in this cause. Their argument appears to be that because this cause is a preliminary injunction, the court should not have given the record *de novo* review. (Petitioner's Brief, pp. 36-37).

The undersigned can find nothing in *Bose Corp.,* supra, that would support such a limited review of the facts in a case involving First Amendment questions. Indeed, the Court notes the importance of such a review of facts where First Amendment issues are present. *Bose Corp.,* supra, 466 U.S. at 508 n. 27. *See also Rankin v. McPherson,* — U.S. —, 107 S.Ct. 2891, 97 L.Ed. 2d 315 (1987), 107 S.Ct. at 1958-1959.

If Petitioners' reading of the case is correct, then many First Amendment cases would become moot while awaiting space on heavy trial court calendars.

———o———

CONCLUSION

The decision of the Fifth Circuit in this cause is correct and reflects the opinions of this Honorable Court in the area of sign regulation. The issue involved here is clearly NOT the prohibition of signs, but is the constitutionally permissible prohibition of a style of sign that presents peculiar aesthetic problems to the community.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

EDITOR'S NOTE

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